

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1655

Cir. Ct. No. 2013CV2078

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

NAZIR AL-MUJAAHID,

PLAINTIFF-APPELLANT,

V.

**RICHARD G. CHANDLER , SECRETARY,
WISCONSIN DEPARTMENT OF REVENUE,**

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Nazir Al-Mujaahid, *pro se*, appeals an order dismissing his petition for a writ of *mandamus* to compel the Secretary of the Wisconsin Department of Revenue to disburse Al-Mujaahid's 2011 income tax

refund. We conclude that Al-Mujaahid filed the petition prematurely, before the Secretary had an obligation to disburse the refund. Therefore, we affirm.

BACKGROUND

¶2 Al-Mujaahid submitted his 2011 Wisconsin state income tax return to the Department of Revenue on January 12, 2012. The return included a request to refund an overpayment. On March 4, 2013, he petitioned the trial court for a writ of *mandamus* to compel the Secretary of the Department of Revenue to disburse the refund. Al-Mujaahid also requested “attorney fees, costs and expenses incurred in bringing th[e] petition,” citing WIS. STAT. § 783.04 (2011-12).¹ The Secretary moved to dismiss the action on the ground that the deadline for the Department of Revenue to refund an overpayment for the 2011 tax year had not yet passed.

¶3 On March 26, 2013, the trial court heard the Secretary’s motion, but continued the matter until April 23, 2013. In advance of the April hearing, a Department of Revenue employee filed an affidavit showing that, on April 3, 2013, she caused the Department to mail an income tax refund check to Al-Mujaahid. When the parties appeared for the hearing, however, Al-Mujaahid denied receiving the check.

¶4 The trial court continued the matter until May 14, 2013, but ordered that, if the Secretary submitted proof of depositing the refund directly into Al-Mujaahid’s bank account before May 7, 2013, the court would remove the case

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

from the calendar unless Al-Mujaahid filed an objection stating that he had not received the money. Trial court docket entries reflect that Al-Mujaahid confirmed on May 6, 2013, that he had received the refund by direct deposit and that “the paper check issued and received as damaged U.S. mail last week will be returned to [the Department] per Mr. Mujaahid.” The Secretary thereafter filed proof of the direct deposit, and the trial court entered an order dismissing the action with prejudice and without costs or fees. Al-Mujaahid appeals, asserting that he is entitled to a writ, damages, and costs.

ANALYSIS

¶5 Whether to grant a writ of *mandamus* rests in the trial court’s sound discretion. See *Vretenar v. Hebron*, 144 Wis.2d 655, 661, 424 N.W.2d 714 (1988). Our standard of review is therefore highly deferential. See *Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶25, 265 Wis.2d 703, 666 N.W.2d 38. We will sustain a trial court’s discretionary decision if it is “a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.” *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981). We search the record for reasons to sustain a trial court’s discretionary decision. *State v. Odom*, 2006 WI App 145, ¶8, 294 Wis.2d 844, 720 N.W.2d 695.

¶6 *Mandamus* proceedings are governed by WIS. STAT. ch. 783. To obtain a writ of *mandamus*, a petitioner must establish that: (1) the petitioner has a clear legal right to relief; (2) the entity to whom the writ is directed has a positive and plain legal duty to act; (3) the petitioner will be substantially damaged by nonperformance of the duty; (4) the petitioner has no adequate remedy at law; and

(5) no reason exists that granting the writ would be inequitable under the circumstances. *See Vretenar*, 144 Wis. 2d at 662.

¶7 “*Mandamus* is the proper remedy to compel public officers to perform duties arising out of their office and presently due to be performed.” *Walter Laev, Inc. v. Karns*, 40 Wis. 2d 114, 118, 161 N.W.2d 227 (1968) (citation omitted). As a general rule, however, the writ will not lie to compel performance of an act by a public officer unless the act be one that is actually due from the officer at the time of the application. *State ex rel. Racine Cnty. v. Schmidt*, 7 Wis. 2d 528, 534, 97 N.W.2d 493 (1959).

¶8 Al-Mujaahid did not establish the prerequisites for a writ of *mandamus*. At the time that he filed his petition for a writ, the duties of the Secretary in regard to his tax refund were not yet “due to be performed.” *See Walter Laev, Inc.*, 40 Wis. 2d at 118 (citation omitted). This is so because the Department of Revenue is allowed one year to act on a refund claim after the taxpayer files the claim. *See* WIS. STAT. § 71.75(7). Here, Al-Mujaahid submitted his refund claim to the Department of Revenue in January 2012, but, pursuant to WIS. STAT. § 71.77(8), an individual’s tax return received by the Department before the deadline is deemed filed on the last day prescribed by law for filing. *See id.* The record shows, and no party disputes, that the deadline for Al-Mujaahid to file his 2011 tax return fell on Tuesday, April 17, 2012. Therefore, as Al-Mujaahid concedes, the Secretary of the Department of Revenue was not required to act on his request for a refund until April 17, 2013. Al-Mujaahid thus had no clear legal right to relief when he filed his petition for a writ of *mandamus* on March 4, 2013. Because Al-Mujaahid did not establish that the prerequisites for a writ existed at the time he began his litigation, the trial court properly exercised its discretion when it dismissed the petition without issuing a

writ. See *Schmidt*, 7 Wis. 2d at 534; see also 52 Am. Jur. 2d *Mandamus* § 371 (2014) (stating that “a cause of action for *mandamus* must exist and be complete before an action may be started”).

¶9 Al-Mujaahid disagrees, asserting that he is entitled to a writ based on actions allegedly taken by Department of Revenue staff that he claims improperly delayed disbursement of his refund check before he filed his petition. These complaints do not alter our analysis. Assuming without deciding that Department staff took actions that delayed disbursement of the refund before Al-Mujaahid filed his petition on March 4, 2013, nevertheless, on that date the Secretary did not have a clear legal duty to disburse a refund to Al-Mujaahid for the 2011 tax year, and he did not have a clear legal right to receive a refund. See WIS. STAT. §§ 71.75(7), 71.77(8). Accordingly, his request for a writ of *mandamus* was premature, and the trial court properly dismissed his petition.²

¶10 Our analysis also disposes of Al-Mujaahid’s request for monetary relief under WIS. STAT. § 783.04. That statute provides: “[i]f judgment be for the plaintiff, the plaintiff shall recover damages and costs.” Because we have determined that the trial court properly exercised its discretion when it dismissed this action without issuing a writ, Al-Mujaahid is not entitled to relief under § 783.04.

² We further observe that this matter is moot. “It is well settled that a case is moot when a determination is sought on a matter which, when rendered, cannot have any practical legal effect upon an existing controversy.” *State ex rel. Unnamed Person No. 1 v. State*, 2003 WI 30, ¶18, 260 Wis. 2d 653, 660 N.W.2d 260. Here, the record shows that Department of Revenue staff mailed a refund check to Al-Mujaahid well in advance of the April 17, 2013 deadline, although delivery was evidently delayed when the item was damaged in the postal stream. Al-Mujaahid acknowledges that he has received the refund. This court generally does not determine moot issues. See *State ex rel. Steiger v. Circuit Court*, 86 Wis. 2d 390, 391, 272 N.W.2d 380 (1978).

¶11 Finally, we note that Al-Mujaahid asserts in his reply brief that he is entitled to sanctions against the Secretary pursuant to WIS. STAT. § 802.05. He did not cite that statute in the opening brief that he submitted to this court. We do not address issues raised for the first time in a reply brief. *See State v. Marquardt*, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

